Supreme Court, U.S.
FILED

03 931 DEC 22 2003

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*,

v.

JOE ELTON NIXON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Assistant Deputy Attorney General

CURTIS M. FRENCH
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

**Counsel of Record*

CAPITAL CASE

QUESTION PRESENTED

1. IN A CAPITAL MURDER CASE, THE FLORIDA SUPREME COURT:

(A) APPLIED AN INCORRECT STANDARD, CONTRARY TO *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), *BELL V. CONE*, 535 U.S. 685 (2002) AND *ROE V. FLORES-ORTEGA*, 120 S.CT. 1029 (2000), BY FINDING DEFENSE COUNSEL INEFFECTIVE *PER SE* UNDER *UNITED STATES V. CRONIC*, 466 U.S. 648 (1984) DESPITE HAVING FOUND COUNSEL'S STRATEGY NOT TO CONTEST OVERWHELMING EVIDENCE OF GUILT BUT TO VIGOROUSLY CONTEST THE SENTENCE IN THE DEFENDANT'S BEST INTEREST AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE, AND

(B) ERRED IN CONCLUDING THAT *BOYKIN V. ALABAMA*, 395 U.S.238 (1969) PROHIBITED TRIAL COUNSEL FROM ADOPTING A STRATEGY, AFTER FULLY INFORMING HIS CLIENT, WITHOUT OBJECTION, NOT TO CONTEST OVERWHELMING EVIDENCE OF GUILT TO PROTECT THE BEST INTEREST OF HIS CLIENT IN CONTESTING THE APPROPRIATENESS OF IMPOSING THE DEATH PENALTY.

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent.*

OPINION BELOW

The opinion below is reported as Nixon v. State, 857 So.2d 172 (Fla. 2003) (hereafter, Nixon III) .[1]

Petitioner's Appendix contains the opinion of the Florida Supreme Court in Nixon III (A2-A36), the Florida Supreme Court's order denying Petitioner's motion for rehearing (A1), and the opinion of the Florida Court in Nixon v. State, 758 So.2d 618 (Fla. 2000) (hereafter, Nixon II) (A37-A70).[2]

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[1] Nixon I is the decision of the Florida Supreme Court affirming Respondent's conviction and sentence on direct appeal, reported at Nixon v. State, 572 So.2d 1336 (Fla. 1990). Nixon II is the decision of the Florida Supreme Court remanding for evidentiary hearing to determine whether Respondent had expressly agreed to trial counsel's strategy, reported at Nixon v. State, 758 So.2d 618 (Fla. 2000). Nixon III is the decision of the Florida Supreme Court following the Nixon II remand.

[2] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below, resolving Respondent's federal claim that he was denied the effective assistance of counsel at his original trial, was entered on July 10, 2003. On October 1, 2003, the Florida Supreme Court denied the State's Motion for Rehearing. Jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall . . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Joe Elton Nixon was convicted of first-degree murder, kidnapping, robbery and arson, and sentenced to death on the first-degree murder conviction. The record shows that Nixon kidnapped the victim, Jeanne Bickner, from a Tallahassee mall, took her to a wooded area several miles outside Tallahassee, tied her to a tree using jumper cables, and set her on fire, burning away most of her left leg and arm, and almost all of her hair and skin.

Nixon informed his trial counsel he was willing to plead to all charges in exchange for a life sentence. Trial counsel Michael Corin presented this offer to the prosecutor, who rejected it due to the overwhelming evidence and the severity of the case (Supp. TR 4, 82-84).[3] Corin saw "no benefit" to entering a plea of guilty without a recommendation of life. Hearing of May 11, 2002, at p. 476-77. However, it was Corin's judgment that contesting the state's overwhelming evidence of guilt would damage the credibility of otherwise plausible arguments he could make at the penalty phase for a life sentence. Believing, as did the State, that sentence was the real issue in the case, he decided as a matter of strategy not to contest the state's evidence at the guilt phase, but to contest sentence vigorously. *Id.* at 425-26, 440-41, 460.

Jury selection took three days. The trial of the guilt phase took another three days. In his opening statement, Corin told the jury the real issue in this case was going to be sentencing; the state, he acknowledged, would be able to prove that Respondent had caused the victim's death, but following the trial would be a penalty phase where the jurors would "learn many facts about Joe Elton Nixon" and, after they heard all the evidence, they would know the "reasons" why "his life should be spared." (TR 1853).

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[3] Citation "TR" is to the original trial transcript; "Supp. TR" references supplements to the original trial transcript, made a part of the original record on appeal.

In his closing argument at the guilt phase, Corin acknowledged that the jury would probably "find that the State has proved beyond a reasonable doubt each and every element of the crimes charged," but again reminded the jury that the trial was "not near over yet," because the second part of the trial was ahead, and promised that he would "give you reasons" why Respondent should not be sentenced to die. (TR 641-43, 673-74).[4]

At the two-day penalty-phase proceedings before the jury, Corin presented testimony from friends and family, from police officers, and from two mental health experts (a psychologist and a psychiatrist), along with school and institutional records and psychological reports dating back to 1972.

In his penalty-phase closing argument, Corin identified for the jury the mitigating circumstances he deemed established - Respondent's low intelligence, his brain damage, his troubles in school, his age, and his emotional disturbance and impaired capacity at the time of the murder (TR 1022-25). He reminded the jury of Respondent's cooperation with police following his arrest, of testimony that Respondent had been a "wild man" when he committed the murder, and of testimony that Respondent had fallen through "cracks" in the system (TR 1025-30). Corin noted that, while Respondent obviously had difficulty living on his own, the evidence showed that he functioned well in the structured environment of prison; thus, a death sentence was not necessary to protect society (TR 1036-38). Reminding the jury of the psychiatrist's testimony, Corin argued that the death penalty might be appropriate for an "intact human being," but Respondent was not, never had been, and never would be an intact human being." (TR 1040). He concluded by saying (TR 1040):

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[4] It bears noting that, although counsel acknowledged that his client was "responsible" for the death of the victim, and that the jury would "probably" find his client guilty as charged, based on the evidence presented, counsel never expressly admitted that his client was guilty of first degree murder.

> You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

On direct appeal, Respondent claimed he was denied effective assistance of counsel when Corin conceded Respondent's guilt and sought leniency at the penalty phase. The Florida Supreme Court remanded to the trial court for hearing on this issue.

At the hearing on remand, Corin testified that he had discussed with Nixon on more than one occasion that, should the state reject his plea offer, counsel's goal would be to save Respondent's life rather than to obtain an acquittal, and he would probably concede his guilt. Counsel testified that he had a good relationship with Respondent that preceded his arrest in this case, and Respondent never told him "not to do that." Supplemental record on appeal from the conviction at 47-54. The lead trial prosecutor testified that Corin's guilt-phase strategy forced the State to be cautious; the State still had to prove its case, but also had to avoid "engaging in overkill." *Id.* at 85. Therefore, the State withheld evidence that it otherwise would have presented. *Id.* at 87. The final witness was a board-certified criminal defense lawyer, who testified (*id.* at 102-03):

> This case involves a situation where . . . there was absolutely no doubt whatsoever that the Defendant Joe Nixon killed Jeanne Bickner. . . . What Mike Corin did was to recognize that this case was essentially one trial that may have had two phases that are involved in it. And what Mr. Corin did was to select the issue that really had to be tried in this case and try that issue. And, quite frankly, I don't think that there was a better strategy that could have been employed in the

defense of this case than the one that Mr. Corin employed.

The trial court found:

> 1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.
>
> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

Nixon v. State, 572 So.2d 1336, 1340 fn. 3 (1990) (Nixon I).

Because Respondent had invoked his attorney-client privilege to restrict the State's cross-examination of trial counsel, the Florida Supreme Court ultimately declined to "dispose of this claim" on direct appeal on the "present state of the record," and affirmed the convictions and sentences, including the death sentence, "without prejudice" to Respondent raising the issue by way of a Rule 3.850 motion for postconviction relief. Id. at 1340.

On October 7, 1993, Respondent filed a state rule 3.850 motion for postconviction relief alleging, inter alia, ineffective assistance of counsel in conceding guilt. The state trial court summarily denied Respondent's motion, rejecting Respondent's claim that "trial counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648 (1984)," without any demonstration of prejudice. The trial court also rejected Nixon's alternative argument that his trial counsel was ineffective at the guilt phase under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984). The trial court found that "defense counsel's concession of guilt" was an "acceptable defense strategy" in the circumstances of this case, and that Respondent had in any event failed to demonstrate prejudice.

The Florida Supreme Court, by a vote of 4-2, reversed. Nixon v. State, 758 So.2d 618 (Fla. 2000) (Nixon II)(A37-70). In the view of both the majority and dissenting opinions, the legal issue before the court was, as stated by Justice Wells in dissent:

> whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se.

Nixon II, 758 So.2d at 631 (Wells, J., dissenting) (A62). The majority concluded that, unless Nixon explicitly consented to trial counsel's concession of guilt, Cronic applied. The court explained:

> We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was

> completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984) .

Nixon II, 758 So.2d at 622 (A44). In the view of the majority, trial counsel's concession of guilt was tantamount to an abandonment of the defense of his client. Id. at 622-23 (A44-A46). And this was so notwithstanding the court's recognition "that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase." Id. at 623 (A46). In the view of the majority of the Florida Supreme Court, the "dividing line" between sound defense strategy and ineffectiveness of counsel was whether the defendant had consented to such strategy. If he had not, trial counsel's performance was deficient, and this deficient performance was prejudicial per se. Ibid (A46-A47).

The court analogized the concession of guilt to a guilty plea. In the context of a guilty plea, the court noted, a knowing, intelligent, and voluntary waiver of the right to a jury trial must be shown. 758 So.2d at 624 (A48-A49) (citing Boykin v. Alabama, 395 U.S. 238) (1969). The court reasoned that counsel's comments in this case were the functional equivalent of a guilty plea" and that Nixon's claim of ineffective assistance of counsel "must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." The court emphasized: "*Silent acquiescence is not enough.*" Nixon II, 758 So.2d at 624 (A49) (emphasis supplied). The court remanded for an evidentiary hearing to determine whether there was an "affirmative, explicit acceptance by Nixon of counsel's strategy;" if not, Nixon was entitled to a new trial. Nixon II, 758 So.2d at 624 (A49).

In elaboration, the court stated:

> We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones [v. Barnes, 463 U.S. 745, 751 (1983)]; Brookhart [v. Janis, 384 U.S. 1 (1966)]. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.
>
> It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision.

Nixon II, 758 So.2d at 625 (A49-A50).

In concurrence, Chief Justice Harding, joined by two other members of the majority, explicitly recognized that trial counsel was competent and that his strategy in this case was an effective one, reasonably calculated to help Nixon avoid the death penalty:

> I do not question the competence of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question *that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty.*

Nixon II, 758 So.2d at 626 (A52-A53) (Harding, C.J. concurring, joined by Anstead and Pariente, JJ.) (emphasis supplied).

Dissenting Justice Wells also explicitly agreed that trial counsel's strategy was reasonable. 758 So.2d at 634 (A62) (Wells, J., dissenting). Justice Wells disagreed with the majority's application of Cronic to this case, noting that the majority's "expansive" interpretation of Cronic had been rejected by a number of federal circuit courts of appeal. Justice Wells analyzed this case as follows:

> What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

Nixon II, 758 So.2d at 631 (Wells, J., dissenting) (A62). In Justice Wells' view, the Cronic standard was applicable only when the defendant was denied any meaningful assistance of all, and this was not such a case:

> No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. . . .

Nixon II, 758 So.2d at 634 (Wells, J., dissenting) (A69).

The circuit court evidentiary hearing mandated by the Nixon II majority was conducted on May 11 2002. Trial counsel Corin once again testified that his strategy had been to save Respondent's life. He had explained that strategy to Respondent. May 11, 2002 evidentiary hearing at 426. He had been an a defense attorney since 1976, and had successfully represented Respondent previously to his capital murder trial. He and Respondent "got along fine," and Respondent understood the court proceedings. *Id.* at 436.

Corin testified that he had talked to and deposed numerous witnesses, as reflected by the copious notes he took. He had discussed "the state of the evidence" with Petitioner. At some point, he had explained to Respondent that his strategy would be to try to avoid the death penalty and not contest guilt. That strategic decision was not one he would have made "lightly" or without first discussing it with Respondent. He "owed it to my client to tell him what's going on." In Corin's "professional

opinion," based on the evidence in this case, such strategy was the "best way to proceed" and possibly the only way to save Respondent's life; if the question of guilt was not going to be a matter that could be the subject of "any reasonable dispute," then it would be much more effective, he testified, to attempt to save Respondent's life through mitigating circumstances at the penalty phase than "going through a trial and arguing things that were not going to make a whole lot of sense." However, he would not have pursued that strategy against Nixon's wishes. *Id.* at 438-46.

Corin testified that each case is different and each client is different; "you hope that you have clients that are cooperative," but if you do not, "[y]ou do the best you can" with "what you have," and you "represent them to the best of your ability." Corin testified that "many times lawyers make decisions because they have to make them because the client does nothing." Such was the case in Nixon's trial *Id.* at 452-55, 473.

The circuit court denied relief. On appeal, the Florida Supreme Court again reversed. Nixon v. State, 857 So.2d 172 (Fla. 2003)(A2-36) (Nixon III). Four justices joined the per curiam majority opinion; one justice concurred in the result only, and two justices dissented. After reiterating its holding in Nixon II, the majority explained its reversal as follows:

> In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither

> agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So. 2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

Nixon III (A8-A9).

Justice Lewis concurred in the result only; in his view, the majority decision was "both legally and logically incorrect," but its conclusion was compelled by the "law of the case" established in Nixon II (A14). Justices Wells and Shaw dissented, expressing the belief that the court's decision was "legally wrong." (A22).

Rehearing was sought by Petitioner, and was summarily denied October 1, 2003 (A1).

REASONS FOR GRANTING THE WRIT

THE CONCLUSION THAT TRIAL COUNSEL WAS INEFFECTIVE *PER SE* IN PURSUING AN EFFECTIVE STRATEGY ACQUIESCED TO BY THE DEFENDANT AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE, IS CONTRARY TO THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON*, *BELL V. CONE* AND *ROE V. FLORES-ORTEGA*, AND, AS WELL, TO LOWER FEDERAL COURT DECISIONS

A. Preliminary Statement

This case presents the question of the appropriate ineffective-assistance-of-counsel standard of review applicable to a concession of guilt by a defense counsel who, after fully investigating and preparing for a capital trial, and after fully informing his client and hearing no objection, has concluded that his client's best chance of avoiding a death sentence was not to contest the state's overwhelming evidence at the guilt phase in order to preserve the defense's credibility with the jury at the penalty phase. The Florida Supreme Court has concluded that, unless the defendant expressly agrees to such strategy, its adoption by defense counsel is *ineffective per se* regardless of the sufficiency of trial counsel's investigation and preparation or of the soundness of his strategic decision - all of which the Florida Supreme Court deems irrelevant. In that court's view, "silent acquiescence" of a fully informed defendant is not enough; instead, the defendant must "explicitly" consent, in words. Absent such explicit consent, trial counsel must contest guilt even if it works to his client's "detriment."

The Florida Supreme Court reached this conclusion by interweaving this Court's decision in United States v. Cronic, 466 U.S. 648 (1984), indicating that a defendant would be relieved of

his burden under Strickland to prove prejudice if he could establish that his trial counsel utterly failed to act as an advocate on his behalf, and Boykin v. Alabama, 395 U.S. 238 (1969), holding that a guilty plea may only be entered after the defendant himself has knowingly, intelligently and voluntarily waived his right to a trial. In the view of the Florida Supreme Court, trial counsel's concession of guilt was the functional equivalent of a guilty plea, and was tantamount to a complete failure to test the state's case, notwithstanding counsel's vigorous opposition to the state's case at the penalty phase.

The question of the appropriate ineffective-assistance-of-counsel standard applicable in cases in which counsel has conceded guilt to some degree has divided lower courts, both state and federal. The greater weight of authority, particularly in more recent authority, is to evaluate counsel's performance under the deficient-performance/actual-prejudice standard of Strickland rather than the presumed-prejudice standard of Cronic. The Florida Supreme Court applied the wrong standard, and its decision is contrary to this Court's precedents and is in conflict with similar decisions of the Eleventh Circuit Court of Appeals and other federal and state courts.

B. Boykin is inapplicable to argument by trial counsel

The court below acknowledged, in a death penalty case, it may be sound strategy for defense counsel to acknowledge the sufficiency of the state's proof at the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Nixon II, 758 So.2d at 623 (A46). As noted in Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In a death penalty case, . . . the possible punishment is so extraordinary that the defense attorney must consider from the outset the impact

that the guilt phase defense may have on sentencing. Since the capital case defense attorney may have to be an advocate both for acquittal and for life, she should not frame a defense case for acquittal which will preclude or handicap effective advocacy for life. Indeed, in a case where a severe conflict or inconsistency between advocacy for acquittal and advocacy for life exists, the defense attorney will be forced to make the difficult decision of preferring one over the other. *The relationship between this advocacy choice and the assessment of an attorney's competence in such cases cannot be overlooked in formulating standards of effective assistance in capital cases.*

> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

Id. at 329 (emphasis supplied). In this case, trial counsel was faced with a "virtually indefensible" guilt phase, and decided not to sacrifice his client's "best chance" with the jury by making arguments the jury was going to reject anyway, hoping to maximize his chances of making a persuasive case for a life sentence at the penalty phase. It has never been contested that trial counsel made a strategic decision, and a majority of the court

below concluded (or at least expressly assumed) not only that counsel made a strategic decision, but that counsel's strategic decision was effective and reasonably calculated to help Nixon avoid a death sentence.[5] Nevertheless, the Florida Supreme Court found that, absent explicit consent by Nixon to counsel's strategy, counsel was ineffective per se. The court reached this conclusion without finding *either* deficient attorney performance *or* prejudice. Instead, the court concluded that conceding guilt without the client's explicit consent is ineffective per se under Cronic no matter how uncooperative Nixon was, no matter how effective counsel's strategy may have been, no matter that Nixon did not affirmatively object to such strategy, and no matter what Nixon's best interests may have been.

Indeed, the Florida Supreme Court erred in reaching its conclusion in reliance upon this Court's decision in Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea may only be entered after the defendant himself has knowingly, intelligently and voluntarily waived his right to a trial), concluding that trial counsel's concession was the "functional equivalent of a guilty plea" and that the same waiver standard should therefore apply.

Strategic concessions of fact by trial counsel, however, cannot reasonably be deemed the functional equivalent of a guilty plea, as lower federal courts have held. See, e.g., U.S. v. Gomes, 177 F.3d 76, 84 (1st Cir. 1999). Gomes states: "[Appellant's] cursory analogy to a guilty plea without safeguards (including the explicit consent and participation of the defendant and a good many formalities as well, Fed.R.Crim.P 11) is a false one. Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here the government had to provide a jury with

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[5] Three justices in the majority and one dissenter *explicitly* drew this conclusion; thus, a majority of the court explicitly found that trial counsel's strategy was reasonable and effective considering the circumstances of this death penalty trial.

admissible evidence of guilt and did so in abundance. [Appellant's] claim that Rule 11 was short-circuited is virtually identical to a claim squarely and properly rejected by the Seventh Circuit in Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (Posner, J.)." (Emphasis in original.)

As noted in Boykin itself, "a plea of guilty is more than an admission of conduct; it is a conviction." In this case, trial counsel's concession was not in itself a conviction. It was not even evidence. Regardless of his concession, the burden remained on the state to prove to the satisfaction of the jury beyond a reasonable doubt that Nixon was guilty, pursuant to the law as given to the jury in charge, and trial counsel never so much as hinted to the contrary. Counsel held the state to its burden of proof, even if he did not expressly contest it. Moreover, certain issues were preserved for appeal notwithstanding counsel's concession that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of objections that trial counsel preserved for appeal, such as objections to the introduction of allegedly inflammatory photographs and to portions of the prosecutor's closing argument. Thus, trial counsel's concession was not "a conviction," and Boykin does not support the decision of the Florida Supreme Court to find ineffectiveness *per se* absent any demonstration of either deficient attorney performance or prejudice.[6]

The Florida Supreme Court supported its application of Boykin to concessions of guilt in reliance on, inter alia, three cases from other states in which trial counsel had conceded their clients'

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[6] As articulated, Boykin requires a guilty plea to be supported by a knowing waiver personally of the defendant's right to a trial. Trial counsel's effectiveness is measured by assessing the reasonableness of counsel's strategy based on the facts and circumstances of the case. While alluring to combine the two analyses, in fact, analysis of each is totally dissimilar and should be maintained as such.

guilt to lesser offenses either without discussing such concession with their clients, or over the clients' expressed objection. Nixon II, 758 So.2d at 623 (A 46), citing State v. Harbison, 337 S.E. 2d 504 (NC 1985) (in murder case, counsel conceded his client was guilty of manslaughter without first discussing such concession with client); State v. Anaya, 592 So.2d 1142 (N.H. 1991) (in first degree murder prosecution, counsel conceded his client was guilty of second degree murder over his client's expressed objection); Jones v. State, 877 P.2d 1052 (Nev. 1994) (same). Nixon's counsel, on the other hand, discussed his strategy with Nixon, and Nixon never objected to the pursuit of that strategy until after the trial was over.[7]

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[7] Since Nixon II was decided, the Florida Supreme Court has, in effect, rejected the very cases it relied upon to apply Boykin to concessions of guilt, when it decided in Atwater v. State, 788 So.2d 223 (Fla. 2001), that counsel was not ineffective per se for conceding (without first obtaining his client's consent) that his client was guilty of second degree murder. In Atwater, the Florida Supreme Court distinguished Nixon II on the ground that Atwater's counsel had only conceded his client's guilt to a lesser crime than charged. Boykin, however, allows for no relaxation of standards of waiver when a defendant pleads guilty to something less than all the crimes charged in the indictment. To the extent that the Florida Supreme Court in Nixon II adopted the test for evaluating concessions of guilt by trial counsel based on Boykin, that same test should be applicable to all concessions of guilt.

Despite its rejection of Atwater's claim of ineffectiveness per se, the Florida Supreme Court continues to apply its interwoven Cronic/Boykin rule, not only in the case at hand, when it concluded in Nixon III that Nixon II was the law of this case, but also to a case in which counsel did not concede guilt, but merely conceded certain irrefutable facts, which, counsel argued, did not establish his client's guilt of first degree murder. See Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003) (because counsel conceded in the face of incontrovertible evidence that his client had discussed with his co-defendant whether to kill, he effectively conceded premeditation and thus was ineffective per se under Cronic/Boykin, despite his argument to the jury that the discussion was "frenzied" and that the killing was impulsive, not premeditated).

The principles adopted by the Florida Supreme Court in Nixon II and applied in Nixon III and in Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003) are contrary to this Court's admonition in Strickland that counsel "owes the client a duty of loyalty." 466 U.S. at 688. Instead of evaluating counsel's performance for reasonableness under the circumstances, the Florida Supreme Court has established mechanical rules which counsel must follow, even if the client suffers. As this Court emphasized in Strickland, the "benchmark" for judging a claim of ineffectiveness is whether or not the trial can "be relied on as having produced a just result." 466 U.S. at 686. Ensuring such a just result cannot be accomplished by requiring counsel to adopt a strategy harmful to his client simply because he has an uncooperative client who refuses to choose a strategy.[8] Moreover, such requirement "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689. The Florida Supreme Court erred in requiring counsel to adhere to mechanical rules regardless of the best interests of his client.

This Court should grant the writ to address and correct the conflict in authority on the application of Boykin to concessions of fact by trial counsel during trial.

C. Cronic does not contemplate both a presumption of prejudice and a presumption of deficient attorney performance and does not apply to strategic and reasonable concessions of guilt

Petitioner's contention is that trial counsel's strategic decision in this case is properly reviewed under the two part test

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[8] It is one thing to hold the defendant personally responsible for a strategy he has chosen; it is an altogether different matter to burden a defendant with the responsibility for a detrimental trial strategy he did not personally choose, which is what Nixon II does. See 758 So.2d at 625 (A49-50).

of Strickland v. Washington, supra, rather than under dicta in Cronic suggesting that, when trial counsel's performance is so lacking that it amounts to no meaningful assistance at all, a breakdown in the adversarial process has occurred which will be deemed prejudicial per se. The Florida Supreme Court failed to recognize or give sufficient weight to the reality that, in a death penalty trial, the most important issue may not be guilt but sentence.[9] In a capital case in which the evidence of guilt is overwhelming, a defendant simply has not been "denied any meaningful assistance of counsel at all" when his attorney decides after reasonable investigation not to contest guilt in order to maximize defense credibility at the penalty phase and maximize the defendant's chances of being sentenced to life rather than death, and Cronic should not apply.

The decision of the Florida Supreme Court is contrary to this Court's recent decision in Bell v. Cone, 535 U.S. 685 (2002), in which this Court held that a trial counsel's failure to test the state's case at "specific points" is insufficient to relieve the defendant of his burden to prove both deficient attorney performance *and* prejudice. In this case, although counsel did not dispute that his client was guilty of a crime for which the death penalty *could* be imposed, he vigorously disputed that his client was guilty of a crime for which a death penalty *should* be imposed. In other words, counsel disputed that his client was guilty of capital murder. Thus, it simply cannot be said that trial counsel's concession of guilt was a "complete" failure to test the state's case, as is required for Cronic to apply.[10]

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[9] See Goodpaster, supra at 338: "The major action in capital cases no longer necessarily takes place at the guilt trial. Penalty trials are not ordinary sentencing hearings; they are complete trials on a crucial issue - life - and counsel and courts must so view them."

[10] Bell v. Cone was decided after Nixon II, but before Nixon III. Although Petitioner cited and relied on Bell v. Cone in its brief on the Nixon III appeal, the Florida Supreme Court's Nixon III opinion nowhere acknowledges the existence of Bell v. Cone.

Two of the federal cases on which the Florida Supreme Court relied, United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) and Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), were not capital prosecutions and the courts found that trial counsel had no sufficient reason to concede guilt.[11] Here, the Florida Supreme Court conceded that trial counsel's performance was not only strategic, but effective, but still applied Cronic. Where, as here, trial counsel's concession is the product of a strategic choice made in the defendant's best interest after full investigation and preparation, counsel's concession of guilt should be analyzed under the two part test of Strickland, to determine whether trial counsel's performance was (a) deficient and (b) prejudicial.[12]

As noted in Justice Wells' dissenting opinion in Nixon II, the federal circuit courts of appeal have been divided in their

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[11] The Swanson court noted that the government had failed to identify any strategy that could have justified trial counsel's concession of guilt. In Wiley, the state did argue that counsel's goal was to obtain leniency in sentencing; however, the circuit court did not find this to have been reasonable strategy absent any evidence that counsel's guilt-phase strategy contributed to his sentencing strategy. It should be noted that Wiley pre-dated Strickland and Cronic and that it was still an open question at the time whether a defendant had any burden to prove prejudice on any kind of ineffectiveness claim; further, the court found that in light of the weakness of the state's case of guilt, counsel's concession of guilt *was* prejudicial.

A third federal case relied on by the Florida Supreme Court, Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988), was a death penalty case, but in that case the defendant had pled guilty; the court found that counsel had abandoned his duty of loyalty to his client, had failed to investigate, had no strategic reason for opposing his clients' attempt to withdraw his guilty plea or for the comments he made at the penalty phase which essentially conceded the propriety of a death sentence for his client. In fact, the court did analyze the case under Strickland, although the court also concluded in addition that counsel had so abandoned his duty to his client that Cronic probably applied.

[12] Defense counsel often concede that the defendant is guilty of some crime, even if they dispute that the defendant is guilty of the most serious crime charged.

interpretation of Cronic where trial counsel has conceded or failed vigorously to contest guilt. Both the Fifth and First Circuit Courts of Appeal have criticized decisions of the Ninth and Tenth Circuits, concluding that these cases have misperceived the rationale underlying Cronic and that the concession of guilt in closing argument appears to be a trial-type error amenable to a Strickland analysis. Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997). Other federal courts have simply applied a Strickland analysis to such claims. See, e.g., Lobosco v. Thomas, 928 F.2d 1054, 1056-58 (11th Cir. 1991) (claim of ineffectiveness of counsel in regard to counsel's concession of guilt in closing argument analyzed and rejected under Strickland); United States v. Sanchez, 790 F.2d 245, 253-54 (2nd Cir. 1986) (claim of ineffective assistance of counsel analyzed and rejected under Strickland, where defense counsel largely adopted strategy of silence and where defendant absented himself from proceedings and failed to consult with attorney).

The standard adopted in Nixon II and applied in Nixon III is in direct conflict with Parker v. Head, 244 F.3d 831 (11th Cir.), *cert. denied*, 543 U.S. 1046 (2001).[13] Parker's counsel had "admitted to the jury during opening and closing arguments that [Parker] was in fact guilty of murder as charged in the indictment." Parker v. Turpin, 60 F.Supp. 1332, 1341 (N.D. Ga. 1999). Parker argued on postconviction that his trial counsel was ineffective *per se* under Cronic for conceding that his client was guilty of murder. The District Court analyzed Cronic as follows:

> In Cronic, the United States Supreme Court stated in a footnote, "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable

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[13] Parker v. Head was decided after Nixon II, but before Nixon III. Although Petitioner cited and relied on Parker in its brief on the Nixon III appeal, the Florida Supreme Court's Nixon III opinion ignores Parker.

doubt." 466 U.S. at 656, n. 19, 104 S.Ct. At 2045. This statement does not prohibit counsel from admitting on behalf of the defendant to any facts charged in the indictment. The statement which immediately precedes the aforementioned comment is equally as important. As in the case at bar, the Supreme Court stated, "If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id. . . .

> [T]here is no per se rule prohibiting counsel from admitting to facts related to one or all of the crimes charged in spite of entering a plea of not guilty. Counsel's statements made in argument do not amount to a stipulation of guilt or the entry of a guilty plea. . . .
>
> Since the decision in Cronic, the Eleventh Circuit has limited its applicability to cases in which "circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Vines v. U.S., 28 F.3d 1123, 1128 n. 8 (11th Cir. 1994) (quoting Chadwick v. Green, 740 F.2d 897, 901 (11th Cri. 1984).). . . .
>
> The record clearly establishes that counsel admitted to causing the death of the victim in order to maintain credibility with the jury for the purpose of avoiding the death sentence. Employing such a legal tactic does not constitute representation which falls below an objective standard of reasonableness.

Parker v. Turpin, supra, 60 F. Supp. at 1342-43. The Eleventh Circuit affirmed, concluding that the state court's rejection of

Parker's Cronic claim was not "contrary to, or an unreasonable application of, the Strickland standard," and that the district court had not erred "in concluding that Parker failed to show the prejudice required under Strickland." 244 F.3d at 840.

Resolution of the conflict in the federal courts, and, as well, the conflict between the decision of the Florida Supreme Court and the Eleventh Circuit's Parker decision, is a valid basis for this Court to grant certiorari in this case. However, Petitioner would note, additionally, that state courts have reached conflicting results on this issue. *Compare* State v. Harbison, 337 S.E. 2d 504 (N.C. 1985) ("when counsel admits his client's guilt without first obtaining the client's consent, the client's right to a fair trial and to put the State to the burden of proof are completely swept away") *with*: Thompson v. State, 915 S.W.2d 897, 902-05 (Tex. App. 1996) (defense counsel's admission of defendant's guilt at voir dire and closing argument at guilt phase analyzed and rejected under Strickland), and People v. Johnson, 538 N.E.2d 1118, 1124-25 (Ill 1989) (court rejected argument that is it per se ineffectiveness whenever defense attorney concedes guilt to offenses in which there is overwhelming evidence of guilt but fails to show on the record consent by defendant).

Cronic holds that, in some cases, constitutionally deficient performance by counsel may be so pervasive that prejudice may be presumed, because "prejudice to the accused" is "so likely that the cost of litigating their effect" is "unjustified." 466 U.S. at 658. But this is not a case involving deficient attorney performance at all. On the contrary, a majority of the Florida Supreme Court determined that Nixon's trial counsel was competent and chose a strategy that was "effective" and "reasonably designed to help the defendant avoid the death penalty," but found that counsel's choice of strategy would be constitutionally deficient no matter how reasonable and effective it might have been unless it was expressly agreed to, in words, by Nixon, and then has further presumed prejudice. As a consequence, Nixon has obtained relief without showing either that his counsel's investigation, preparation or

strategy were not the "result of reasonable professional judgment," Strickland, 466 U.S. at 690, or that the strategy counsel adopted was prejudicial. Nothing in Cronic, however, contemplates presuming both components of the Strickland test for ineffective assistance of counsel, or presuming that trial counsel's performance is constitutionally deficient even though he has conducted a reasonable investigation and chosen a reasonable trial strategy based upon that investigation.

This would be a different case if Nixon's trial counsel had responded to his difficult client by just throwing up his hands in frustration and doing nothing, or if he had actively betrayed his duty of loyalty to his client by choosing a strategy he knew to be counter to his client's best interests. But there has been no demonstration in this case that the performance of Nixon's trial counsel was objectively unreasonable, or that he ever abandoned his duty of loyalty to his client, or that he failed to pursue what he believed to be the best possible course of action under the circumstances confronting him. On the contrary, the record shows that counsel prepared extensively for Nixon's trial, deposing more than 50 witnesses (and talking to additional potential defense witnesses, including family members, without deposing them), securing the services of two mental health experts (a psychiatrist and a clinical psychologist, each of whom testified that Florida's two statutory mental health mitigators applied), and securing and presenting school and institutional records demonstrating mental and emotional deficiencies dating back at least to age 10. Counsel knew exactly what the case was about; the problem for counsel was that the evidence (which included no less than seven different confessions to friends, family and law enforcement) was overwhelming and that the murder was a highly aggravated one. Trial counsel acted in pursuit of his client's best interests, focusing on the real issue in this case - that of sentence - by presenting defense evidence and argument designed to reduce Nixon's moral culpability for this brutal murder based on his mental and emotional deficiencies.

This is not a case in which trial counsel's strategic choices are invalid because counsel failed to conduct a reasonable investigation, as in Wiggins v. Smith, 123 S.Ct. 2527 (2003). Moreover, even in such cases, whether a defendant has received competent representation by his counsel must be analyzed under Strickland's deficient-performance/actual-prejudice standard. Nixon is entitled to no more. Cronic presents the wrong standard for analysis and is inapplicable here. This Court should grant the writ to resolve the conflict between its decisions and the decision of the Florida Supreme Court.

D. The Florida Supreme Court's insistence on a formal waiver is contrary to federal precedent

It is undisputed in this case that Nixon not only failed to state an objection on the record to his trial counsel's adopted strategy, but has never presented any evidence to show that he disagreed with that strategy at the time of the trial, much less that his will was "overborne" by his trial counsel. On the contrary, trial counsel's unrebutted testimony was that (a) Nixon was willing to plead guilty in exchange for a life sentence; (b) when the State rejected Nixon's plea offer, counsel decided that not to contest the State's case for guilt, without expressly conceding guilt of first degree murder by plea or otherwise; (c) counsel informed Nixon of his planned strategy; (d) Nixon never objected; and, finally, (e) if Nixon had objected to counsel's proposed strategy, counsel would not have pursued it. The Florida Supreme Court did not reject these conclusions, but simply found them insufficient, holding that trial counsel was ineffective *per se* if counsel did not obtain Nixon's "affirmative, explicit" consent to counsel's strategy. In the view of the Florida Supreme Court, Nixon's "silent acquiescence" was not enough to bring counsel's performance outside the ambit of Cronic.

This insistence on an explicit consent to counsel's strategy conflicts with Dean v. Superintendent, 93 F.3d 58, 61-62 (2d Cir. 1996) (even assuming that the Constitution precluded trial counsel

from imposing an insanity defense on an unwilling defendant, the right would be "subjected to practical constraints"; a defendant who did not object on the record at trial but later claimed that his counsel's presentation of an insanity defense violated his personal right not to present such a defense, must show not only that he "disagreed" with the strategy adopted by his trial counsel, but that his "will was 'overborne' by his counsel").

The decision below, and its insistence on formal waivers, is likewise inconsistent with Taylor v. United States, 287 F.3d 658 (7th Cir. 2002) (generally, "formal waivers are not essential to voluntary decisions; [n]othing in the Constitution or any decision of the Supreme Court justifies meddling in the attorney-client relationship by requiring advice to be given in a specific form or compelling the lawyer to obtain a formal waiver").

The decision below, and its insistence on *explicit, verbal* waiver, is also inconsistent with this Court's decision in North Carolina v. Butler, 441 U.S. 369 (1979) (while presuming waiver from a silent record is impermissible, "[t]hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights").

Further, the decision below, which, in a postconviction proceeding, effectively places the burden on the State to demonstrate that Nixon explicitly agreed with his trial counsel's strategy, is inconsistent with this Court's decisions in U.S. v. Timmreck, 441 U.S. 780 (1979) ("concern for finality" served by limitations on collateral attack "has special force with respect to convictions based on guilty pleas"), and U.S. v. Vonn, 535 U.S. 55 (2002) (defendant's failure to object to plea procedures at trial is a waiver of objection absent plain error; where a defendant fails to speak up "when a mistake can be fixed," it is not unfair to place the burden of proving prejudice on the defendant).

Finally, the decision of the Florida Supreme Court is inconsistent with, and contrary to, this Court's recent decision in Roe v. Flores-Ortega, 528 U.S.470 (2000), in which this Court rejected the Ninth Circuit Court of Appeals' "bright line" rule that, in order to establish ineffective assistance of counsel in failing to file a notice of appeal, a habeas petitioner "need only show that his counsel's failure to file a notice of appeal *was without the petitioner's consent*," in favor of a more case-specific analysis as required by Strickland v. Washington, concluding that ay other course would be inconsistent with Strickland's rejection of "mechanistic rules governing what counsel must do." 528 U.S. at 479.[14]

In the instant case, the Florida Supreme Court held that consultation and acquiescence was not enough. Instead, the Florida Supreme Court applied a *per se* rule that, absent Nixon's explicit consent to counsel's guilt-phase strategy, counsel was constitutionally ineffective. This is the imposition of exactly the kind of "mechanical rules on counsel" which this Court rejected in Strickland and Roe. 528 U.S. at 481.

CONCLUSION

The Florida Supreme Court failed to analyze counsel's performance under Strickland and to require Nixon to establish (1) deficient attorney performance considering all the circumstances, and (2) actual prejudice. Instead, the Florida Supreme Court undertook neither part of the Strickland inquiry, but analyzed this case under Cronic. The Florida Supreme Court failed to give any deference to trial counsel's "strategic choices" or to his evaluation of the risks of contesting guilt when the evidence of guilt was overwhelming and the issue of sentence would be litigated before the same jury who would have heard the evidence and decided the issue of guilt. Nor did the court properly consider other facts and

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[14] Roe v. Flores-Ortega is another case ignored by the Florida Supreme Court in Nixon III.

circumstances of the case, including the client's expressed willingness to plead guilty in exchange for a life sentence.

This Court should grant a Writ of Certiorari and summarily reverse for reconsideration in light of Bell v. Cone and Roe v. Flores-Ortega.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Asst. Deputy Attorney General

CURTIS M. FRENCH
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida, *Petitioner*,

v.

Joe Elton Nixon, *Respondent.*

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Supreme Court of Florida

WEDNESDAY, OCTOBER 1, 2003

CASE NOS.: SC01-2486; 92006;
SC93192
Lower Tribunal No.: 84-2324-CF

JOE ELTON NIXON vs. STATE OF FLORIDA
JOE ELTON NIXON vs. JAMES V. CROSBY, JR., ETC.

Appellant/Petitioner Appellee/Respondent

Appellee/Respondent's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.
WELLS and SHAW, Senior Justice, dissent.

A True Copy
Test:

_____
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

EDDIE D. EVANS
ARMANDO GARCIA
ERIC M. FREEDMAN
CURTIS M. FRENCH
HON. BOB INZER, CLERK
HON. JANET E. FERRIS, JUDGE

SUPREME COURT OF FLORIDA

Nos. SC92006, SC93192 & SC01-2486

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

JOE ELTON NIXON,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 10, 2003]

PER CURIAM.

Joe Elton Nixon, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Additionally, he files a petition for writ of habeas corpus with this Court. We have jurisdiction. See art. V, § 3(b)(1),(9), Fla. Const. For the reasons that follow, we remand this case to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).[1] The United States Supreme Court denied Nixon's petition for a writ of certiorari. See Nixon v. Florida, 502 U.S. 854 (1991). Subsequently, in 1993, Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appealed the trial court's summary denial of his 3.850 motion to this Court. Additionally, Nixon filed a petition for a writ of habeas corpus with this Court. Nixon raised seven issues relating to the denial of his rule 3.850 motion[2] and

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[1] Hereinafter referred to as Nixon I.

[2] The issues raised in Nixon's appeal of the denial of his 3.850 motion were: (1) whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) whether he was denied his right not to be tried while mentally incompetent; (3) whether his death sentence had to be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) whether he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) whether he was entitled to prove his claims under Johnson v. Mississippi, 486U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) whether he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) whether the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

three issues in his habeas petition.[3] See Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).[4]

In Nixon II, this Court found Nixon's claim that he was denied the effective assistance of counsel when his lawyer conceded guilt without his consent to be the primary issue in the case. Nixon's counsel made the following statement during opening argument of the guilt phase:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible, death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 758 So.2d at 620.

During closing argument, Nixon's counsel made the following statement:

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[3] In his habeas petition Nixon argued that: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competency to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State and Jackson v. State.

[4] Hereinafter referred to as Nixon II.

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

On appeal, the parties were in disagreement regarding the appropriate standard of review to be applied in this case. The State argued that the standard explained in Strickland v. Washington, 466 U.S. 668 (1984), should be applied, whereas Nixon argued that because counsel's concessions amounted to per se ineffective assistance of counsel, the United States v. Cronic, 466 U.S. 648 (1984), standard was the proper test. Ultimately, this Court held that if Nixon could establish that he did not consent to counsel's strategy, then the Court would find counsel to be per se ineffective under the Cronic standard. This Court reasoned that the Cronic standard should apply because:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Nixon, 758 So.2d at 623 (quoting Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981)). Since counsel's comments operated as the "fundamental equivalent of a guilty plea," this Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon's of counsel's strategy. Silent acquiescence is not enough." Id. at 624. To avoid similar problems in the future, this Court said:

> [W]e hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Id. at 625 (citations omitted). Accordingly, we remanded the case to the trial court to hold an evidentiary hearing on the issue of whether Nixon consented to trial counsel's strategy.[5]

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[5] This Court declined to address the remaining issues in Nixon's 3.850 appeal. Additionally, this Court opted not to address Nixon's habeas claims given its disposition of his 3.850 appeal.

On remand, an evidentiary hearing was held before Judge Janet Ferris on May 11, 2001. Although Nixon was present at the evidentiary hearing, he did not testify; the only witness presented was Michael Corin, Nixon's trial counsel. After the hearing, the trial court denied relief and found that Nixon consented to counsel's strategy. This appeal followed.[6]

LAW AND ANALYSIS

The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in Nixon II. In reaching the merits of his issue, this Court must decide whether there is competent, substantial evidence to support the trial court's conclusion that Nixon consented to trial counsel's strategy of conceding guilt.[7] In Nixon II, this Court directed the trial court to conduct an evidentiary hearing to determine whether evidence existed which indicated an "affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." 758 So.2d at 624. Nixon never testified at the evidentiary hearing on this issue. On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy:

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[6] This appeal includes not only the Strickland/Cronic issue but also the even issues not addressed in Nixon II. Because we grant relief on the ineffective assistance of counsel claim, we do not address the other issues or the claims raised in the habeas petition.

[7] Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002) (quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)).

Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?

A: [Corin] I though I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.

Q: And how did he respond?

A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.

Q: Now what do you mean by he did nothing?

A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans, I have said it before.

Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt.[8] Thus, at most, this testimony demonstrates silent acquiescence by Nixon to counsel's strategy.

The trial court indicated that it would consider the totality of the circumstances in making a determination of whether Nixon affirmatively and explicitly agreed to counsel's strategy of conceding guilt to the charged crime. The court in its written order noted that one of the factors that needed to be examined was the general pattern of Corin's interactions and communications with

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[8] Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy.

Nixon. After reviewing the trial record, Nixon I and Nixon II, the transcript of the evidentiary hearing conducted on December 19, 1988, and Corin's testimony at the May 11, 2001, evidentiary hearing, the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy.

In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

CONCLUSION

Accordingly, for the reasons stated in this opinion in Nixon II, we reverse the trial court's denial of postconviction relief and remand for a new trial. In light of our disposition of Nixon's rule 3.850 appeal, Nixon's habeas corpus petition is dismissed as moot.

It is so ordered.

ANSTEAD, C.J., and PARIENTE, QUINCE, and CANTERO, JJ., concur.
ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE and QUINCE, JJ., concur.
LEWIS, J., concurs in result only with an opinion.
WELLS, J., dissents with an opinion, in which SHAW, Senior Justice, concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., specially concurring.

I concur in the majority opinion because it simply reaffirms a fundamental principle long ago established by the United States Supreme Court and consistently adhered to by courts, that counsel cannot enter a plea of guilty to a criminal indictment without the express consent of the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty . . . ."); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (holding that attorney does not have the power to enter a plea of guilty or to admit guilt "in effect" where the defendant has not consented to such a strategy); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1996) ("[C]ertain litigation decisions are considered 'fundamental' and are for the client to make. These include decisions on whether to plead guilty, whether to testify, and whether to take an appeal."); Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) ("[T]he decision to plead guity is one that must be made by the defendant, and is not one in which an attorney may speak for his client without consultation."); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir 1981) ("Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty,

entails the obligation of his attorney to structure the trial of the cae around his client's plea."); Childers v. State, 782 So.2d 513, 517 (Fla. 1st DCA 2001) ("It is well established that an attorney may not concede guilt for any crimes to which the defendant had pled 'not guilty' unless the court finds that the defendant understands the consequences of the concession, because it is the functional equivalent of a guilty plea."); Taylor v. State, 695 So.2d 1293, 1295 (Fla. 5th DCA 1997) ("While counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea without [the defendant's] consent.").

This fundamental principle is so firmly established that we have long ago incorporated it into an explicit and mandatory rule of criminal procedure. See Fla.R.Crim.P. 3.171(c)(1) ("Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant."); see also Fed.R.Crim.P. 11 (requiring court to conduct inquiry of defendant wishing to plead guilty on the record to ensure defendant knows consequences of such plea); ABA Standards for Crim. Justice, Std. 4-5.2 (3d ed. 1993) (stating that what pleas to enter and whether to accept a plea are ultimately decisions to be made by the accused after receiving full and careful advice from counsel).

Of course, this fundamental principle applies equally to the most heinous offenses as well as those of a less serious nature. Further, while the delay in the resolution of this case should be cause for concern, it is apparent that a significant portion of that delay has been caused by either the failure to apply this principle at the trial level, or out of concern that the State be given every opportunity to demonstrate that the defendant did agree to allow his counsel to admit his guilt to capital murder. We have explicitly denied the defendant any privilege to prevent his counsel from

testifying about the defendant's consent to counsel's admission of guilt to capital murder.

When we previously reviewed this case, Justice Harding wrote an opinion that continues to provide a compelling explanation for our adherence to this fundamental principle:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocence until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, Jr., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n. 158, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting

William O. Douglas, Foreward to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel may have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla.R.Crim.P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

> In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Nixon v. Singletary, 758 So.2d 618, 625-26 (Fla. 2000) (Harding, C.J., concurring).

PARIENTE and QUINCE, JJ., concur.

LEWIS, J., concurring in result only.

In concur in result only because I am compelled to do so solely and exclusively by the doctrine of law of the case. Although the decision and result here are, in my view, both legally and logically incorrect, the "roadmap to reversal" was previously drawn, and the misdirection of the correct applicable legal concepts written in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), which has become commonly referred to as Nixon II with which I dissented at the time. As unfortunate and convoluted at these legal and factual circumstances may be, I am bound by the prior decision of this Court and will honor its precedent.

In concurring in result only, I do not suggest that this Court has applied the appropriate standards or delivered the correct

principles of law in connection with cases involving defendants who have intentionally disrupted the legal process and legal proceedings for their own advantage as has occurred here. I believe the record clearly demonstrates that the defendant here intentionally disrupted his original trial proceedings, effectively blocked a proper and full truth-finding determination of the effective assistance of counsel issue when initially presented to this Court, and has now secured judicial benefits flowing from his disruptive tactics related to the legal proceedings conducted following the death of the victim in 1984. Almost twenty years after the event, this Court is rewarding an intentionally disruptive defendant and misdirecting a fair and just determination of the issues that should be properly before the court.

I suggest that this Court became misdirected when it held that the present case involved ineffective assistance of counsel per se under the decision of the United States Supreme Court in United States v. Cronic, 466 U.S. 648 (1984), when this Court considered the issue in Nixon II. In my view, this Court had previously considered and rejected such position ten years earlier in 1990 in Nixon v. State, 572 So.2d 1336 (Fla. 1990), when this Court unanimously affirmed Nixon's convictions and sentences. As I read the record in this Court, Nixon asserted on appeal to this Court prior to 1990 that per se ineffective assistance of counsel under Cronic had occurred during the trial proceedings. At that time, this Court remanded the case to the trial court simply for an evidentiary hearing to determine whether Nixon had been informed of the strategy to concede the factual predicate for the case and to center the case upon seeking leniency and preserving the life of the defendant. When the case was remanded at that time, the trial court found and determined:

> 1. Trial Defense Counsel Corin reviewed with capital Defendant/Appellant Nixon, the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.

2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

State v. Nixon, No. 84-2324-CF, order at 10 (Fla. 2d Cir. Ct. order filed Oct. 3, 1989).

The foregoing findings by the trial judge were entered as the case had been remanded to the trial court for specific findings on the issue. The trial court's order and findings were abundantly clear that Nixon never sustained his burden in connection with the claims of ineffective assistance of counsel based upon allegations that he was neither informed, nor knew of the trial strategy, nor did Nixon carry his burden to demonstrate that he had not consented to the trial strategy employed by this defense counsel. The findings entered before our 1990 opinion are important in consideration of the flow of the present case because in our earlier 1990 opinion, we specifically stated:

> However, the state's examination of Mr. Corin [defense counsel] was extremely limited due to this refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client

> privilege. Nixon refused to waive the privilege and the State was unable to fully examine Mr. Corin.
>
> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Nixon v. State, 572 So.2d at 1340 . It is clear that this Court was concerned at that time that it was not permitted to have access to the full information because Nixon had refused to waive the attorney-client privilege. The Court at that time noted that the record was incomplete due to Nixon's failure to waive the attorney-client privilege.

In my view, this Court in 1990 considered and rejected application of United States v. Cronic and rejected the view that under these circumstances per se ineffective assistance of counsel arose. If Cronic were applicable when presented to this Court in 1990, it would have been unnecessary to conduct further proceedings regarding the interaction between Nixon and his counsel. I suggest that the Court in 1990 understood the record before it and concluded that the record did not establish per se ineffective assistance of counsel as the applicable standard. There would have been no need for further activity had that been the conclusion of this Court at that time. In my view, this Court only permitted Nixon an opportunity to present the issue again in a collateral motion to afford an opportunity to Nixon to establish by additional evidence the elements required by Strickland. When the postconviction collateral motion was filed by Nixon and considered initially, Nixon chose not to present sufficient evidence to afford relief under Strickland, and, in fact, precluded full examination of the issue with regard to counsel's performance by refusing to permit his counsel to testify concerning their conversations. In

essence, in the collateral proceeding, this Court in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), permitted Nixon to assert the issue of ineffective assistance of counsel and then assert an attorney-client privilege by remanding for consideration of the issue under the standard established in Cronic rather than applying the requirements of Strickland.

My view of the record indicates that Nixon confessed to law enforcement and to members of his family with regard to the facts surrounding the murder of the victim in this case. The evidence indicated that Nixon was competent to participate in the trial proceeding, that he was malingering, and that he was attempting to disrupt the orderly process of the trial court proceedings. Under these circumstances, the majority of this Court in Nixon II, in my view, precluded trial counsel from attempting to save the life of a defendant through a trial strategy that would accept the existence of the overwhelming factual evidence and attempt to center upon preserving the life of the defendant. This Court announced the requirement in Nixon II that before this type of trial strategy or trial tactic may be utilized, the attorney must either first obtain express approval of the trial court after presenting all of the negative factual information to a trial judge who is the final adjudicator as to whether a death penalty will be imposed or obtain the express acceptance of a particular trial strategy by a disruptive defendant who has no intention of ever cooperating so that a trial proceeding could move forward. In m view, this Court reached an impractical result in Nixon II, and such result and the standards expressed therein rendered the proceedings which we now review as perfunctory steps in the process.

My review of this record demonstrates an especially aggravated circumstance where the victim had been kidnapped in her own motor vehicle from a local shopping mall, the victim had been tied between trees with motor vehicle jumper cables and the victim was actually burned alive. Here, Nixon confessed not only to law enforcement in substantial detail, but he also confessed to members of his immediate family who testified about those very

confessions during the trial. Three well-respected trial judges have now examined the issue of trial counsel's effectiveness and the trial strategy utilized, and have made it clear that this defense attorney was approaching this case in the only available and reasonable defense posture possible in attempting to save Mr. Nixon from the death penalty under the facts presented in this case.

In the initial postconviction collateral proceeding, the trial judge entered an exhaustive order detailing the conduct of this capable defense counsel and the very significant actions, including the introduction of some fifty exhibits in support of mitigation and the presentation of at least nine witnesses to provide mitigation evidence directed to the defendant's background, and mental and emotional problems. The trial judges have continuously emphasized the strategic theme and trial tactic that focused upon Nixon's mental and emotional problems and that defense counsel was simply presenting the very best argument and approach to secure a life sentence with the admitted aggravated factors that were presented before the jury.

When the case was before this Court in 2000, the trial judge during the initial postconviction proceeding had expressly addressed and rejected the argument that these circumstances must be controlled by United States v. Cronic, and the trial judge at that time expressly stated:

> (3) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that Cronic obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In Cronic, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a Defendant is denied presence of counsel at a critical stage in the prosecution or when there is a breakdown in the adversarial process that would justify a presumption that a Defendant's conviction was reliable. Id. at 2046-2049. Cronic applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the Defendant was in effect denied any meaningful assistance at all. See also, Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermine the reliability of the finding of guilt. Cronic, supra, at 2047 (citing Strickland v. Washington, 466 U.S. at 693-606, 104 S.Ct. At 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. Cronic, supra, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. Cronic, supra, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the penalty phase, is an acceptable strategy, Defendant is required to show

> prejudice. This reasoning is consistent with other courts that have applied the Strickland standard for ineffective assistance of counsel claims, which requires prejudice to similar defense strategies. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without concession. For the same reasons discussed under the Strickland claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

When this Court in 2000 rejected this reasoning, it failed to accommodate the severe and aggravated factors with which the trial court was faced. The defendant here would not attend trial court proceedings, the defendant had removed his clothing in a holding cell, and the defendant had demanded that a different judge conduct the proceedings and that he be assigned different counsel. I suggest that the record in these proceedings prior to this Court's decision in 2000 reflects that Nixon had continually attempted to disrupt the proceedings in this case. When this Court rendered its decision in 2000 in Nixon II, it demonstrated that Nixon had succeeded in his attempt and that decision was predicated upon all facts which were available to be considered.

In my view, experienced defense counsel, who was doing the very best under the most difficult of circumstances, attempted to save the life of this defendant. The circumstances in this case involved very heinous and aggravated circumstances and the violent and aggravated circumstances were admitted by the defendant to not only law enforcement personnel but also to members of his family who all testified in detail concerning those confessions. Here, the circumstances, trial strategy, and trial tactics of experienced defense counsel have now been recognized by

multiple trial judges as the clearly appropriate and essentially the only defense strategy available under these aggravated facts. This record demonstrates that experienced defense counsel was conscientious and worked diligently in the best interests of his client as he attempted to preserve his life. In my opinion, it is clear that everyone, including Nixon, was aware of the trial strategy but the burden placed upon the proceedings by this Court in Nixon II rendered the present outcome the only possible outcome under the law and standards as stated.

I am extremely concerned that the history in this case may be improperly utilized by individuals in the future and that due to the nature of the restrictions this Court has now placed upon defense counsel, the defense of death penalty defendants will not be performed in the most effective manner possible. I suggest that cases such as this place trial lawyers in the most difficult of situations. When an individual confesses not only to law enforcement but also to members of his or her immediate family with regard to very aggravated and heinous crimes and this Court will not permit a trial attorney to even acknowledge that which has been confessed as true but forces the attorney to engage in full litigation as though the confessions never occurred, lawyers and the judicial system are placed in a precarious position and citizens are legitimately caused to question the veracity of lawyers and judicial proceedings. If I were writing on a clean slate, I would affirm the decision of the trial court here but, unfortunately, Nixon II directs a different result and I am therefore compelled to concur in the result based solely upon the law of the case.

WELLS, J., dissenting.

I dissent because I conclude that this Court's granting to defendant Nixon a new trial is legally wrong and not justified or demonstrated to be required by the majority opinion.

It has now been almost nineteen years since Ms. Bickner was abducted from the Governor's Square Mall in Tallahassee and murdered. This same issue upon which a new trial is now granted by the majority has been framed in this record since Judge Hall made his statement at the close of the trial proceedings in 1985. Clearly, this same issue was in the record when this Court affirmed Nixon's conviction and sentence of death in 1990.

Then, in 2000, if this Court was going to grant a new trial on this issue, the question was expressly before this Court. I wrote at that time:

> I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 624 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a [Boykin v. Alabama, 395 U.S. 238 (1969)] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in

> 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Nixon v. Singletary, 758 So.2d 618, 634 (Fla. 2000) (Wells, J., dissenting). But this Court did not order a new trial but remanded this case for an evidentiary hearing in the circuit court.

Upon that remand, Judge Janet Ferris held the hearing ordered by this Court's majority. Judge Ferris thereafter, in an exceptionally thorough and thoughtful order, came to the conclusion that the postconviction motion should be denied. In pertinent part, Judge Ferris' order states:

> Issues now before this court for resolution involve legal challenges initially raised in Defendant Joe Elton Nixon's direct appeal from his conviction and sentence of death for the murder of Jeanne Bickner. Ms. Bickner was murdered on August 12, 1984. Joe Elton Nixon's trial for that murder took place in July of 1985, and his conviction was appealed to the Florida Supreme Court. In the direct appeal, the Court was asked to address Mr. Nixon's claim that he was denied effective assistance of counsel at the guilt phase of his trial when his attorney, Assistant Public Defender Michael Corin, conceded guilt and sought leniency regarding Mr. Nixon's punishment. To fully

> explore that issue, the Florida Supreme Court temporarily relinquished jurisdiction to the trial court in October of 1987 to "determine whether Nixon was informed of the strategy to concede guilt and seek leniency." Nixon v. State, 572 So.2d 1336, 1339 (Fla. 1990).
>
> Due to some confusion about the procedure to be followed at the evidentiary hearing, a second order was issued by the Supreme Court on October 4, 1988, to outline which witnesses would be permitted to testify and limitations on their cross-examination. Continuing confusion about the scope of the hearing and the trial court's responsibilities at that hearing resulted in another clarifying order on February 1, 1989. At the August 30, 1989, hearing that finally attempted to resolve the ineffective assistance issue, Mr. Nixon declined to waive the attorney-client privilege, which effectively precluded Mr. Corin from discussing his communications with Mr. Nixon. The Supreme Court found the record of those proceedings "less than complete," and ultimately declined to dispose of the claim, inviting the defendant to revisit the matter in a post-conviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. Nixon, at 1339-1340.
>
> Mr. Nixon filed his 3.850 motion on October 7, 1993. In 1997, the trial court denied the motion without an evidentiary hearing. Included in that order was the summary denial of several claims asserting that Mr. Nixon's trial counsel was ineffective, including the specific claim that Mr. Corin's concession of guilt without an express waiver by Defendant on the record constituted per se ineffective assistance of counsel under United

States v. Cronic, 466 U.S. 648 (1984). The trial court disposed of Mr. Nixon's Cronic claim by finding that ". . . his case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. . . . Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution (citation omitted)." That order was appealed to the Florida Supreme Court, resulting in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), the decision which has again remanded Mr. Nixon's case to the trial court for a limited evidentiary hearing.

In Nixon v. Singletary, the Supreme Court considered both the trial court's summary denial of Mr. Nixon's 3.850 post-conviction motion and his petition for writ of habeas corpus. In deciding to remand the case to the circuit court for an evidentiary hearing, the Court concluded that the ". . . resolution of one issue . . . [is] dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial." Nixon v. Singletary at 620. Although numerous ineffectiveness claims were raised in Mr. Nixon's 3.850 motion, the Court's decision focused on Nixon's charge that his attorney's concession of guilt in opening statement was ". . . the equivalent of a guilty plea by his attorney." Nixon v. Singletary at 620. Mr. Nixon's further claim that he did not give his attorney consent to enter a guilty plea and did not consent to a trial strategy in which guilt would be admitted was a compelling issue for the Court. In a lengthy opinion, the Court concluded that Mr. Corin's statements to the jury

were the "functional equivalent of a guilty plea." Nixon v. Singletary at 624.

Reasoning further that due process requires ". . . a court accepting a guilty plea to carefully inquire into a defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary . . . ," the Court indicated that Mr. Nixon's "consent to this trial counsel to concede guilt" would apparently substitute for the lack of an inquiry and finding by the trial court that the "plea" was intelligent and voluntary. As further direction to this court regarding the evidentiary hearing, the Supreme Court observed that ". . . Nixon's claim must prevail at the evidentiary hearing below if the testimony established that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Nixon v. Singletary at 624. The Supreme Court found that the need for affirmative, explicit acceptance of this trial strategy emanates from the principle that ". . . the defendant, not the attorney, is the captain of the ship. . . . Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather the question is whether Nixon approved of the course." Nixon v. Singletary at 625.

The Supreme Court's remand appears limited to one issue: did Joe Elton Nixon give his attorney, Mike Corin, consent to concede guilt at trial, and was that consent supported or evidenced by an "affirmative, explicit acceptance by Nixon" of this specific aspect of the trial strategy? One might

suspect that such a question could be answered quickly and easily following a brief hearing. Unfortunately, that is not the case. Not only has there been disagreement about the status of Mr. Nixon's other post-conviction claims, but there is continuing dispute about the appropriate legal standard to be employed in resolving claims such as this. The State has forcefully argued that the Florida Supreme Court's understanding of United States v. Cronic, supra, is flawed, and that recent federal court decisions interpreting Cronic have explicitly rejected the Supreme Court's analysis of the issue. The State argues here, as it has recently in the United States Supreme Court, that the Florida Supreme Court's interpretation of Cronic is "overly expansive" and is contrary to the holding of the seminal post-conviction case of Strickland v. Washington, supra. Although compelling arguments, this court cannot agree that it is a liberty to revisit the legal basis for the remand in Nixon v. Singletary, supra. Other opportunities exist for the State to present its argument for resolution by the Florida Supreme Court and the United States Supreme Court.

It is obvious, however, that the Florida Supreme Court's opinion presents this court with a dilemma. Ordinarily, those matters deemed inappropriate for summary resolution of 3.850 post-conviction claims are returned to the trial court intact for an evidentiary hearing, and the resolution of the motion is based on application of the law to the facts determined at the hearing. In Nixon v. Singletary, the Supreme Court not only resolved the legal issues, but also circumscribed the type of evidence and the manner in which it could be considered by the trial court in addressing Mr.

Nixon's claim. The most obvious concern faced by this court is how to balance the Supreme Court's direction to not only determine whether Mr. Nixon gave his consent to Mr. Corin's strategy of concession of guilt, but to do so only in the context of an "affirmative, explicit acceptance by Nixon" of that strategy. Ordinarily, the trial court may consider many factors in resolving issues of knowing and voluntary waivers of rights, and this case should be no exception. The court must also note that the burden of advancing his claim rests with Mr. Nixon, not the State, but the language of Nixon v. Singletary, suggests a shifting of that burden. The court can only conclude that such a shift was not intended, and that the burden of proof still rests with Mr. Nixon to show that he did not consent to the strategy affirmatively and explicitly.

At the evidentiary hearing held on May 11, 2001, Mr. Nixon did not testify, although he was present in the courtroom. Instead, counsel for Mr. Nixon called Mr. Corin to the witness stand, presumably to show that Mr. Nixon did not consent. Mr. Corin was candid and forthright in his testimony, and struggled to recall the details of an attorney-client relationship that was forged seventeen years ago. The details of that relationship are complicated by Mr. Nixon himself, a rather intractable client charged with an especially horrible and notorious crime. The record of the guilt and penalty phases of his trial demonstrate that Mr. Nixon had mental health problems dating back to a very young age. Mental health professionals who examined Mr. Nixon prior to trial specifically noted that although Mr. Nixon was competent to stand trial and "technically" capable of cooperating with his attorney, ". . . his lifelong history of lying and

creating fantasy situations and blaming others for his troubles . . . [will make it] extremely difficult to get his full cooperation. . ."

That difficulty was evident a trial when Mr. Nixon removed his clothing in the holding cell during jury selection in an express demonstration of his refusal to attend the trial; he had previously refused to attend pretrial motions on July 8 and 9, 1985, forcing Mr. Corin to waive his presence at those hearings. Nixon v. State, at 1341. Without much elaboration, he insisted on being returned to the jail, wanted a new attorney, demanded a black judge, and threatened to disrupt the rial if he was forced into the courtroom. Nixon v. State, at 1341. During his conversation with Judge Hall in the holding cell, Mr. Nixon rarely answered the question posed to him, and at one point flatly refused to answer any more questions. The colloquy between Mr. Nixon and Judge Hall shows that Mr. Nixon was generally unresponsive to Judge Hall's patient inquiries, and consciously evaded answering the judge's questions regarding his refusal to enter the courtroom. The Supreme Court accepted Judge Hall's finding that Mr. Nixon's extraordinary behavior constituted a knowing, intelligent, and voluntary waiver of his attendance at the trial. That waiver, however, was based on the judge's finding that if Mr. Nixon failed to return to the courtroom after the recess, he would be consenting to proceeding without him. Id.

This court concurs in Judge Hall's conclusion that Mr. Nixon knowingly, intelligently, and voluntarily waived his attendance at the trial. However, it must be noted that the record does not reflect what

would ordinarily be considered an affirmative, explicit waiver by Mr. Nixon of his right to be present at trial; instead, Judge Hall made his decision based on the circumstances as they existed at the time, Mr. Nixon's unusual behavior, and his exasperating conversation with Mr. Nixon. It is therefore obvious that the decision regarding whether Mr. Nixon consented to Mr. Corin's trial strategy can be made only after careful consideration of similar factors.

One of those factors must be the general patterns of Mr. Corin's interactions and communications with Mr. Nixon. By 1984, when he undertook representation of Mr. Nixon in this case, Mr. Corin was an experienced trial attorney, and had also handled capital criminal appeals as an Assistant Attorney General and an Assistant Public Defender. Mr. Corin's experienced with capital cases included attending and lecturing at a course designed exclusively for attorneys involved in capital cases. It is also of some note that Mr. Corin had represented Mr. Nixon in at least one other felony case prior to him being charged with first degree murder. The record clearly reflects that Mr. Corin conscientiously prepared the case for trial, and met numerous times with Mr. Nixon to discuss various trial strategies, the defenses that might apply in the case, and witnesses.

Mr. Corin indicated that his relationship with Mr. Nixon was generally positive, and that they got along "fine." Despite an apparent lack of rancor or hostility in their attorney-client relationship, Mr. Corin noted that Mr. Nixon was not especially communicative, and often did not respond at all in discussions about the case. Testimony from Mr.

Corin about Mr. Nixon's reaction to discussions about trial strategy, and in particular about conceding guilt, was especially compelling; Mr. Corin observed that although he discussed these matters with Mr. Nixon on several occasions, Mr. Nixon "did nothing." More importantly, Mr. Corin stated unequivocally that he would not have pursued the strategy of conceding guilt if Mr. Nixon had objected. The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally, tell his client what strategies he intended to pursue. It makes little sense to assume that a lawyer would encourage of prefer such stony silence from his or her client; there can be no doubt that active participation by the client in their defense is far more productive. It is also clear that when a client is a highly educated, intelligent, and articulate individual with no mental health problems, the patterns of communication between lawyer and client will be quite different from what usually transpired between Mr. Corin and Mr. Nixon. Mr. Corin did the best he could with a difficult case and a difficult client.

In resolving post-conviction claims, defendants urge trial courts to revisit each and every decision made by an attorney before, during and after a trial.

Increasing numbers of motions to withdraw pleas are filed, and post-conviction motions asserting misadvice of counsel leading up to entry of a plea have flooded the trial courts. At their core are various assumptions about a criminal defendant's "right" to perfection in his or her representation. As the State noted in its Memorandum, everyone involved in the court process must possess a ". . . true understanding of the realities of representing criminal defendants." Mr. Corin perhaps stated the obvious when he testified that representing criminal defendants is a "pretty tough job" because some clients are helpful and others are not. He patiently pointed out that as a defense attorney ". . . you hope that you have clients that are cooperative"; when clients are not, "you do the best you can . . . [and] represent them to the best of your ability." In response to a question from Assistant State Attorney Eddie Evans, Mr. Corin responded as follows: "But you've never been a criminal defense lawyer. So you don't really understand exactly how it is when you represent human beings in cases. And it is just not black and white, but and dry. There are many times lawyers make decisions because they have to make them because the client does nothing." Mr. Corin's response was: "Yes, sir."

Mr. Corin's statements are compelling. The record of Mr. Nixon's trial provides ample evidence of what Mr. Corin faced in his interactions and communications with Mr. Nixon. It is hard to imagine a more onerous situation than a client charged with first degree murder absenting himself from the trial; here, in addition to a confession and overwhelming evidence, Mr. Corin had to contend with the prejudice Mr. Nixon would

surely create by not being present in the courtroom during the trial. Did Mr. Nixon discuss with Mr. Corin his decision to take off his clothing and refuse to enter the courtroom? Should there have been an inquiry about whether this was Mr. Nixon's execution of an agreed-upon trial strategy, and whether he consulted with his attorney about it? It is evident Mr. Nixon made his position known through bizarre behavior and angry statements, and not by an affirmative or explicit discussion of his decision with trial counsel or the court. It is likewise impossible to resolve the Supreme Court's question by reliance on an unrealistic construct. Mr. Corin's conduct as an attorney in this case must be evaluated by the objective standards described in the case law articulated by the United States Supreme Court, the Florida Supreme Court, and our District Courts of Appeal. That objective standard also must be applied to the facts and circumstances of this case, without resort to unfair presumptions about what should have occurred.

Relying on the trial court, the two reported decisions of the Florida Supreme Court addressing Mr. Nixon's case, and the evidentiary hearings conducted on December 19, 1988 and May 11, 2001, this court finds that Mr. Nixon did consent to the trial strategy of conceding guilt. His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court further finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does

not mean that it was not given. Looking to Mr. Nixon's manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior, rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit. Were we now to craft a legal standard requiring articulation for every knowing and voluntary waiver of rights, where other evidence exists to support the conclusion that a knowing and voluntary waiver occurred, we will create a standard that is impossible to meet. We may also encourage the creation of situations that will be impossible to resolve: if after jeopardy attaches in a jury trial, the defendant merely refuses to answer a judge's questions about his or her presence at the trial, agreement with trial strategies such as conceding guilt on some charges but not others, or testifying at trial, what is the appropriate resolution of such an obvious stalemate? Trial courts must be given the opportunity to resolve such matters based upon the facts, rather than the existence or non-existence of certain words. In the case at bar, Mr. Nixon's actions speak clearly. We cannot now search for words that he was clearly disinclined to provide.

State v. Nixon, No. R84-2324AF, order at 1-14 (Fla. 2d Cir. Ct. order filed Sept. 20, 2001) (record references omitted). Judge Ferris did what this Court's majority ordered. She held an evidentiary hearing and reached a factual conclusion. Now this court rejects Judge Ferris's conclusion and grants a new trial. I agree with Judge Ferris.

SHAW, Senior Justice, concurs.

Three Cases Consolidated:

Two Appeals from the Circuit Court in and for Leon County,

L. Ralph Smith, Jr., Judge - Case No. 84-2324

and An Original Proceeding - Habeas Corpus

Jonathan Lang, New York, New York, Eric M. Freedman, New York, New York, and John J. Lavia, III of Landers & Parsons, Tallahassee, Florida,

for Appellant/Petitioner

Charles J. Crist, Jr., Attorney General, and Curtis M. French, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent.

Joe Elton NIXON, Petitioner,

v.

Harry K. SINGLETARY, Respondent,

Joe Elton NIXON, Appellant,

v.

State of Florida, Appellee,

Nos. SC93192, SC92006

Supreme Court of Florida.

Jan. 27, 2000

Rehearing Denied June 9, 2000

After his first-degree murder, kidnapping, robbery, and arson convictions and death sentence were affirmed on direct appeal, 572 So.2d 1336, defendant sought postconviction relief. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court held that: (1) remand was required to permit trial court to determine whether defendant consented to trial strategy in which counsel conceded guilt, and (2) presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of that strategy.

Remanded.

Harding, C.J., concurred and filed a separate opinion in which Anstead and Pariente, JJ., concurred.

Anstead, J., concurred specially and filed a separate opinion.

Wells, J., dissented and filed a separate opinion.

Lewis, J., dissented.

Jonathan Lang, New York, New York, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, Tallahassee, Florida, for Respondent/Appellee.

PER CURIAM.

Joe Elton Nixon, a prisoner under sentence of death, appeals the trial court's order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Nixon also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we remand this case to the circuit court to hold an evidentiary hearing on Nixon's ineffective assistance of counsel claim.

Nixon was convicted of first-degree murder, kidnapping, robbery, and arson. He was sentenced to death for the first-degree murder conviction. On appeal, this Court affirmed the conviction and sentences, including the death sentence. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).

Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appeals the trial court's denial of his motion for postconviction relief. He also petitions this Court for a writ of habeas corpus. Nixon raises seven issues relating to the trial court's denial of his rule 3.850 motion.[1] He raises three issues in his petition for writ of habeas corpus.[2] We find the resolution of one issue to be dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial.

Nixon's trial counsel made the following remarks during his opening statement in the guilt phase:

> In this case, there was be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.

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[1] Nixon argues the following claims relating to the trial court's denial of his 3.850 motion: (1) the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) he was denied his rights not to be tried while mentally incompetent; (3) his death sentence must be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) he is entitled to prove his claims under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[2] Nixon presents the following claims in his habeas petition: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competence to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State, and Jackson v. State.

> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 572 So.2d at 1339. During his closing argument, Nixon's counsel said:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Harkinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id. Nixon argues that these comments were the equivalent of a guilty plea by his attorney. He claims that he did not give his

attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be admitted.[3] Nixon claims that as a result of these comments, he was denied effective representation.

On direct appeal, this Court addressed this issue and remanded the case to the trial court for an evidentiary hearing to determine whether counsel had received Nixon's consent to use this trial strategy:

> Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

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[3] Nixon voluntarily absented himself from the courtroom during his trial. Hence, he was not present when his attorney made the statements in question.

Id. at 1339-40. This Court eventually declined to rule on the matter:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. at 1340 (footnote omitted).

We begin our analysis by reiterating that the Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend VI.[4] The United States Supreme Court has stated that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

In addition to the right to effective assistance of counsel, "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The State bears the burden of making this demonstration. See Speiser v. Randall, 357 U.S. 513, 526 (1958).

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[4] "In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court held that the Sixth Amendment right to counsel was incorporated into the due process clause [of the Fourteenth Amendment] and would apply to the states in all felony prosecutions." Vagner v. Wainwright, 398 So.2d 448, 450 (Fla. 1981).

The parties are in disagreement regarding the appropriate standard of review in this case. The State urges this Court to apply Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Nixon, on the other hand, argues that counsel's conduct in this case amounted to per se ineffective assistance of counsel, and that United States v. Cronic is the proper test. In Cronic, decided the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner has been "denied the right to effective cross-examination" which "would be constitutional

> error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

Cronic, 466 U.S. at 658-59 (emphasis added).

We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) ("Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery[,] . . . tainted the integrity of the trial[,] . . . [and] was an abandonment of the defense of his client at a critical stage of the criminal proceedings.");[5] Osborn v. Shillinger, 861 F.2d 612,

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[5] The Swanson court also stated:

> The circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Swanson's court appointed attorney told the jury that there was no reasonable doubt regarding his client's identity as the perpetrator of the crime charged against him, he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985)). Instead of serving as his client's advocate during closing argument, Mr. Ochoa abandoned his client at a critical stage of the

625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'"). Therefore, if Nixon can establish that he did not consent to counsel's strategy,

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> proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Swanson was the person who intimidated the victims and robbed the bank.
>
> Mr. Ochoa's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. In Osborn, the Tenth Circuit commented as follows:
>
> > A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.
>
> 861 F.2d at 629.
>
> The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By arguing that no reasonable doubt existed regarding the only factual issues in dispute, Mr. Ochoa shouldered part of the Government's burden of persuasion.
>
> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.
>
> 943 F.2d at 1075 (emphasis added).

then we would find counsel to be ineffective per se and Cronic would control. We agree with the reasoning of Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), where the Sixth Circuit Court of Appeals stated:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Under Cronic, a defendant need not show prejudice; prejudice is presumed. See 446 U.S. at 658-60. See also State v. Harbison, 337 S.E.2d 504, 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim.

We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 877 P.2d 1052 (Nev. 1994); State v. Anaya, 592 A.2d 1142 (N.H. 1991); State v. Harbison, 337 S.E.2d 504 (N.C. 1995).

Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ."); Brookhart v. Janis, 384 U.S. 1 (1966) (stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.

Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion. Implicit within that invitation was that the postconviction circuit court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. Admissibility of a confession must voluntariness issue which satisfies the constitutional rights of the defendant." Jackson v. Denno, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, than an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422.

Id. at 242-43 (footnote omitted). Consequently, this Court has stated that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992). See also Fla. R. Crim. P. 3.172.

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough. We also make clear that pursuant to Nixon's ineffective assistance of counsel claim, Nixon has waived the attorney-client privilege. See Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994) ("Thus, it is clear that conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege."); Sec. 90.502(4)(c), Fla. Stat. (1999).

We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed, counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones; Brookhart. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the

State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision. Cf.. Faretta, 422 U.S. at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. See Wiley, 647 F.2d at 650 ("In those areas where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin."); State v. House, 456 S.E.2d 292, 297 (N.C. 1995) ("Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a Harbison issue arises at trial."). This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt. In light of our disposition of Nixon's 3.850 appeal, we do not address his habeas claims at this time.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs with an opinion, in which ANSTEAD and PARIENTE, JJ., concur

ANSTEAD, J., specially concurs with an opinion.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

HARDING, C.J., concurring.

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. preamble (emphasis added). As exemplified by the Preamble to this nation's Constitution, justice is the very foundation upon which our system of government was built. Inherent within the concept of justice is the fair processing of cases. Black's Law Dictionary provides the following definition of justice:

> Proper administration of laws. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render [all persons their] due.

Black's Law Dictionary 864 (6th ed. 1990) (emphasis added). Consequently, the term "due process of law" has developed to mean:

> A course of legal proceedings according to those rules and principles which have been established in

> our systems of jurisprudence for the enforcement and protection of private rights.

Id. at 500.

Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one

reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Aside from the merits, this case is troublesome because of the length of time it has taken for this Court to get to this point. The trial in this case occurred in 1985, yet the trial court's ruling on the 3.850 petition was not ripe for our review until the end of 1998. However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the

merits. No defendant should be denied the relief required simply because of delay.

For these reasons, I concur with the majority opinion.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., specially concurring.

I concur in Chief Justice Harding's opinion. The outcome of this case is controlled by the holding of the United States Supreme Court:

> [E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656-57 n.19 (emphasis supplied). Obviously, a decision to "stand trial" was made here.

As to the issue concerning counsel's decision to, in essence, enter a plea of guilty without Nixon's consent, the dissent reminds us of the adage that "hard cases make bad law." When we decide cases, we must do so in accord with rules of law that apply to all cases, and therein lies one of the principle flaws in the dissenting opinion. That opinion fails to acknowledge, much less discuss, the rule of law concerning the entry of a guilty plea, and counsel's role and responsibility to her client if counsel believes that a guilty plea should be entered. Instead, it simply concludes this was a hopeless case with horrible facts; therefore, counsel should be free to do anything, including pleading the defendant guilty without the consent of the defendant.[6] As to the law, while the dissent

[6] In fact, the procedure advocated by the dissent here would be much worse and more prejudicial than the entry of a formal plea of guilty, because at least a formal plea would have foreclosed the State from presenting, during

apparently concludes that this defendant's case is hopeless, it ignores the cases to come, especially the ones that will arise if we were to adopt a rule of law that says counsel can make the decision as to a plea of guilty without the consent of the client. That is part of the "bad law" that would come from this "hard case" if we accepted the dissenting view.

The dissent also ignores the fact that the postconviction proceedings and enlargement of the record we previously mandated have never occurred. On direct appeal, we refused to deal with the competency of counsel claim because of the inadequacy of the record and with the express provision that it would be more properly resolved in a postconviction proceeding. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). We know this not only because we expressly said so in Nixon, but also because we had the same issue arise in a subsequent case where we cited our holding in Nixon as one requiring an evidentiary hearing in a postconviction action. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). By approving the trial court's decision, we would be concluding that the same record that was declared inadequate by a unanimous court in 1990 has now become adequate to resolve this issue, and we would be overruling the holding of a unanimous court in the 1990 opinion. Further, we would be ignoring our prior explicit mandate in this very case, and ruling now, as a matter of law, that a lawyer is authorized to concede a defendant's guilt regardless of the defendant's views or input.

The record presented to us also reflects a serious issue as to Nixon's competency. Nixon's competency to stand trial first became an issue when he stood trial on an unrelated assault and

a trial on guilt, the extensive devastating evidence of guilt alluded to by the dissent. The kind of "guilty plea" allowed here to be entered by counsel alone gave the defendant the worst of all worlds: an admission of guilt plus the devastating evidence put on by the State during a guilt phase trial that was rendered unnecessary by counsel's guilty plea.

battery charge five months before his murder trial.[7] At that trial, Nixon's attorney raised the issue of his client's competency. That prompted the judge to request a psychologist, Dr. Carolyn Stimel, to examine Nixon. This examination occurred during the lunch hour of the proceedings and last approximately forty-five minutes. The evaluation did not consist of any psychological testing nor was a formal competency evaluation made. Notwithstanding, the assault trial continued.

The next time that Nixon's competency was discussed was during a pretrial conference in the murder case. At this pretrial conference, the state attorney was concerned about Nixon's competency and urged an examination. There is also evidence that months before trial, Dr. Ekwall opined that Nixon's intelligence was "on the law side of normal, but its adequate." Finally, in 1993, Nixon was examined by three different mental health experts, all three of whom opined that Nixon suffers from mental retardation and may have some form of organic brain damage or organic personality disorder. Despite these concerns, however, both parties essentially concede that no competency hearing was ever conducted.

Specifically, Dr. Henry Lee concluded that Nixon suffers from mental retardation and shows unmistakable evidence of Organic Personality Disorder. After evaluating Nixon, he found it surprising that no formal competency hearing was conducted in this case, especially given Nixon's bizarre conduct and statements prior to and during trial. He also found that in addition to the record information, the affidavits of several people, including an attorney skilled in defending the mentally ill, attest to Nixon's psychotic behavior. Dr. Denis William Keyes also concluded that Nixon is mentally retarded and suffers from evident brain damage. The psychological tests administered to Nixon place him below the lowest one percent of the population. Finally, Dr. Alec J. Whyte

[7] This assault trial involved the same counsel and was conducted before the same judge who presided over his murder trial.

opined that Nixon suffers from mental retardation and an organic personality disorder. He specifically noted that the process of a criminal trial was beyond Nixon's competence to comprehend, and that his behavior during the trial is evidence of his inability to comprehend what was occurring.

All three of these opinions were based in part on Nixon's behavior before and during trial. This behavior included Nixon's refusal to leave his cell during pretrial hearings, the removal of his clothing, and his hiding under the sheets of his bed when summoned by officials. Furthermore, two months before trial, Nixon wrote an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance.

Based primarily on the above evidence and evaluations of the mental health experts, Nixon alleged in his 3.850 motion that he was not competent to stand trial. Notwithstanding, the trial court summarily denied this claim, finding it procedurally barred. However, the record does not support this conclusion. On the contrary, the record reflects that at the very least, Nixon was entitled to an evidentiary hearing on whether he was competent to stand trial. See Peede v. State, 24 Fla.L.Weekly S391, S393 (Fla. Aug. 19, 1999); Jones v. State, 478 So.2d 346 (Fla. 1985). In fact, the State concedes that because the judge, prosecutor, and defense counsel in this case, as well as some of the experts who evaluated Nixon contemporaneously with the time of trial and who opined that a competency hearing was not necessary, are still available, a nunc pro tunc hearing could be held in this case. See Mason v. State, 489 So.2d 734 (Fla. 1986).

WELLS, J., dissenting.

I dissent.

A thorough review of the record and a plain reading of our opinion in Nixon's direct appeal leads me to the inescapable conclusion that Nixon's claim of ineffective assistance of counsel

is governed by Strickland v. Washington, 466 U.S. 668 (1984). Competent, substantial evidence supports the trial court's summary denial of Nixon's claim.

I begin my analysis with reference to the facts as set forth in this Court's opinion in Nixon v. State, 572 So.2d 1336 (Fla. 1990):

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida

Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon his Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where th took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G.

572 So.2d 1338.

I next note the following statements from the two able and experienced trial judges who were involved in this case. First, is the statement of Judge hall made at the close of the proceedings in 1985:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that

sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.

Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.

It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.

It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case, presentation, would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.

For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.

A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.

Mr. Cronin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

Second, I note the statement of Judge Smith in ruling upon Nixon's Cronic[8] claim in the postconviction proceedings.

Finally, in respect to the trial record and the direct appeal, there are three matters which are crucial to my conclusion that the majority's decision is wrong:

1. Nixon was presumed to be mentally competent to stand trial. There was no determination by the trial court that he was incompetent, and no issue was raised on appeal that the trial court erred in failing to find him incompetent to proceed.

2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

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[8] United States v. Cronic, 466 U.S. 648, 654 (1984).

> 3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. If Strickland applies, rather than Cronic, then correct legal analysis dictates that the trial judge should be affirmed, not reversed, because competent, substantial evidence supports the trial court's legal ruling that Nixon has failed to establish the requisite prejudice.

I first point out that the decision of whether Cronic applies on this record was decided by this Court in 1990, when it entertained Nixon's direct appeal. Had this Court in 1990 concluded that Cronic applied, surely it would have applied it and not wasted these last nine years. The record before this Court now stands the same as the record before it when it first considered Nixon's Cronic claim in 1990. The trial court was correct in concluding that Strickland applied, for why else would the Court have sent the case on to postconviction proceedings? What the majority actually does is grant a rehearing of the 1990 decision by this Court, and that is wrong.

I also point out that the majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa v. Dubois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. at 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. at 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can been employed only if the record reveals

presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See id. at 659, 104 S.Ct. at 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26, 104 S.Ct. at 2047 n.26.

For the most part, courts have been cautious in invoking the exception limned in the Cronic dictum. Cronic-like principles have been applied, for example, in situations in which defense counsel labored under an actual conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), or in which no attorney appeared despite a defendant's unwaived right to appointed counsel, see United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991), or in which defendant's lawyer sat in total silence throughout the relevant proceeding, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (involving resentencing); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (holding that defense counsel's muteness throughout trial, including his utter silence as the judge directed a verdict against his client, is per se prejudicial), or in which the defense attorney was absent from the courtroom during a critical part of the trial, see Green v. Arn, 809 F.2d 1247, 1259-64 (6th Cir.), cert. granted, vacated and remanded to consider mootness, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987);

Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985), or, pre-Cronic, in which counsel snoozed through much of the proceedings, see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is per se prejudicial); Osborn, 861 F.2d at 628-29 (finding per se prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). We believe that these cases misperceive the rationale underlying the Cronic expression. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance - for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. at 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys

correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in the context of the defendant's trial, other federal courts have refused to march under the Cronic banner, and, instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. Thus, in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990), the defendant claimed that his lawyer's lack of preparedness and failure to raise an insanity defense justified the invocation of the Cronic dictum. See id at 352-53. In requiring a showing of prejudice, the Fifth Circuit noted that "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Id. at 353; see also United States v. Thompson, 27 F.3d 671, 676 (D.C. Cir. 1994) (finding no prejudice per se in defense counsel's failure to inform defendant before guilty plea that, as a career offender, he faced possible life imprisonment); United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir.) (finding no prejudice per se where attorney conceded his client's guilt at pretrial conference and neglected to request jury instruction on overt act requirement for conspiracy charge), cert. denied, 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1933); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (requiring showing

of prejudice where defense counsel advised the accused to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-45 (2nd Cir.) (applying full Strickland standard in spite of defendant's claim that counsel's errors were so pervasive as to amount to "no counsel at all"), cert. denied, 498 U.S. 990, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990); Green v. Lynaugh, 868 F.2d 176, 177-78 (5th Cir.) (applying full Strickland analysis to attorney's decision to conduct "almost no investigation"), cert. denied, 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989); Henderson v. Thieret, 859 F.2d 493, 499 (7th Cir. 1988) (applying second prong of Strickland to attorney's lack of preparation in connection with sentencing), cert. denied, 490 U.S. 1009, 109 S.Ct. 1648, 104 L.Ed.2d 163 (1989); Gardner v. Ponte, 817 F.2d 183, 186-87 (1st Cir.) (refusing to extend Cronic to attorney's failure to object to jury instructions), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987); State v. Savage, 120 N.J. 594, 577 A.2d 455, 466 (1990) (finding no prejudice per se in a capital case where counsel only met once with defendant). Similarly, in reviewing claims of ineffective assistance of counsel at the appellate level, courts have declined to apply Cronic to attorney errors that do not amount to the constructive absence of counsel. See, e.g., Hollenback v. United States, 987 F.2d 1272, 1276 & n.1 (7th Cir. 1993) (finding no per se prejudice in appellate counsel's citation to wrong provision of money-laundering statute); United States v. Birtle, 792 F.2d 846, 847-48 (9th Cir. 1986) (finding no per se prejudice when defendant's appellate counsel failed to appear at oral argument or file a reply brief).

> There authorities suggest that attorney error, even when egregious, will almost always require analysis under Strickland's prejudice prong. We agree. Thus, we decline to adopt the expanded version of Cronic embraced by the district court. Our reasons are manifold, but four of them are paramount.

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.2d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a constructive denial of counsel. Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis. See Scarpa v. Dubois, 38 F.2d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d 1229 n.12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n.8.

No fair reading of the instant record can lead to the conclusion that Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase. This was appropriately stated by Judge Hall in 1985, and this Court is wrong to ignore it in 1999.

I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 14 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a Boykin[9] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-

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[9] Boykin v. Alabama, 395 U.S. 238 (1969).

the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Finally, I believe this case again exemplifies why this Court must have a much better and more pro-active case management procedure in capital cases. If, as the majority now holds, the record had to contain "specific testimony," there is no justifiable explanation as to why it has taken a decade to determine whether that testimony exists or to require a new trial. Since I have been on this Court, I have repeatedly advocated that this Court actively case-manage these cases following the direct appeal. This case plainly demonstrates the past-due need for this Court to implement procedures for quarterly case management conferences in the trial courts with status reports reviewed each quarter by this Court and direction through the Chief Justice to the Chief Judge or each circuit in respect to cases in which appropriate progress in the adjudication of postconviction issues is not being made.